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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-69

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

*Petitioners,*

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## RESPONDENT WILL COUNTY CARPENTERS DISTRICT COUNCIL'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Taking the facts pleaded by Plaintiffs in their complaint as true, do they state a cause of action under the antitrust laws where the factual allegation is that a union has a wage dispute both with an association of contractors and with non-affiliated, independent contractors and strikes and lockouts occur at the expiration of their collective bargaining agreements and where a struck customer of one non-affiliated, independent contractor directs its contractor to settle with the union on the customer's projects so that the work for the customer can be resumed? Were the antitrust laws violated here?

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*Petitioners,*

v.

**WILL COUNTEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,**

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## RESPONDENT WILL COUNTY CARPENTERS DISTRICT COUNCIL'S BRIEF IN OPPOSITION

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## CITATION TO THE OPINIONS BELOW

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The unpublished Memorandum Opinion and Order of the District Court is reproduced at pages 27-33 of the Appendix at the back of this brief ("APP. 27-33"). The Court of Appeals for the Seventh Circuit affirmed the District Court's opinion in a decision ("Slip op. pg. ——"), not yet published, which appears at pages 1-26 of the Appendix.

## FEDERAL RULE OF CIVIL PROCEDURE AND STATUTES INVOLVED

The District Court dismissed the complaint because it failed to state a claim upon which relief can be granted. FRCP, Rule 12(b)(6). Section 1 of the Sherman Act, 15 U.S.C. § 1, Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52 and Sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. § 104, 105 and 113 are also involved herein and appear in the Appendix at pages 39-43.

## STATEMENT OF THE CASE

Respondent Will County Carpenters District Council submits this Brief in Opposition to Petitioners' petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

The factual facets of the decision of the Court of Appeals was drawn from Petitioners' complaint. The decision accepted the allegations in a light most favorable to Petitioners. It provides an excellent statement of the case and, accordingly, for the convenience of the Court, we adopt it herein:

> "The plaintiffs are three trade associations ('the Trade Associations') and two private contractors ('the Contractors') ('Plaintiffs' or 'Petitioners'). The defendants are the Will County Carpenters District Council ('the union'), its international, Commonwealth Edison ('Edison'), and the Gust K. Newberg Construction Company ('Newberg'). *The action stems from*

*a labor dispute in Will County during the summer of 1979.* (Italics supplied).[A]

"The Trade Associations represented most construction contractors in Will County[B] and had traditionally negotiated a collective bargaining agreement with the union's construction workers which became the standard for all Will County contractors. In 1979, however, the Trade Associations and the union could not agree on contract terms prior to the termination of the existing contract. Soon after the contract expired, the union directed its members to engage in selective picketing and strikes against certain contractor members of the Trade Associations. The Trade Associations responded to this action by directing all their members to engage in a defensive lockout of the union.

"At this time, Newberg was engaged in construction for Edison on a nuclear generating station under construction in Braidwood, Illinois, and an existing generating facility in Romeoville, Illinois. Although Newberg was not a member of any of the Trade Associations, these projects were, nevertheless, subject to the strikes and lockouts.

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A. At this point it is informative to note that the Norris-LaGuardia Act defines a labor dispute as including "'*any controversy concerning terms or conditions of employment,* or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of *whether or not the disputants stand in the proximate relation of employer and employee.*' 29 U.S.C. § 113(c)." (APP 7, fn. 9; Slip op. pg. 7, fn. 9). (Italics provided).

B. The other contractors are independents which represent themselves in negotiations with the union.

"Edison allegedly moved to prevent work stoppage on the projects by entering into an agreement[C] with the union whereby Edison would 'pressure' Newberg, as well as its other contractors, into paying into an escrow account $2.25 per employee for each hour worked during the strike.[1] The contractors were to pay this money into the account for all work done since the expiration of the previous contract, and the funds were to be released in accordance with any collective bargaining agreement negotiated by the union and the Trade Associations.[2] Edison agreed to compensate its contractors for this expense. Newberg employed approximately twenty-five per cent of the Will County union carpenters on its Edison projects, and these workers returned to work after the escrow agreement was reached. Approximately four weeks later, on August 20, the Trade Associations and the union agreed

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C. The actual agreement was entered into with Edison's contractor and was limited to specific Edison projects. The escrow agreements appears at APP. 34.

1. (Court's footnote) "Edison's other contractors, who were members of one of the Trade Associations, were not named as defendants, although they too are alleged to have participated in the escrow agreement." (APP. 3, fn. 1; Slip op. pg. 2, fn. 1). Interestingly, the Trade Associations and the union both, as a group and independently, met with Edison in an attempt to convince Edison to support their respective positions (Plaintiffs' Appendix to their Brief to the Seventh Circuit, A-11, para. 9).

2. (Court's footnote) "The amount paid to the escrow account was in addition to the existing wage scale. Thus, if the agreement ultimately reached between the union and the Trade Associations called for a $1.25 per hour wage increase, that amount would be paid out of the escrow fund, with the remainder returned to the contractor." (APP. 3, fn. 2; Slip op. pg. 3, fn. 2).

to a $2.25 per hour minimum wage increase retroactive to June 1, 1979.

"The plaintiffs then brought this action in district court.[3] The complaint alleged that the defendants had violated Section 1 of the Sherman Act, tortiously interfered with contractual relations between the Trade Associations and their members, and engaged in a civil conspiracy to interfere with these contractual relations.

"The Plaintiff's Section 1 (of the Sherman Act) claim asserted that by entering into the escrow agreement, the defendants undercut the bargaining position of the Trade Association, thus forcing them to pay a retroactive wage equal in amount to that deposited in the escrow account. This amount, the complaint alleged, was artificially high, since it was subsidized by Edison which, as a public utility, was insulated from competition. Thus, the agreement was a combination, contract or conspiracy which imposed a wage scale that would injure the contractors, and which interfered

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3. (Court's footnote) "One of the trade associations first filed a complaint with the National Labor Relations Board alleging that the district union had failed to bargain in good faith. This claim was rejected by the Board. Letter from Alex V. Barbour, Regional Director, to Charles E. Murphy (September 6, 1979) (Re: Carpenters District Council of Will County and Vicinity (Mid-America Regional Bargaining Association) (Case 13-CB-8611)." (APP. 3, fn. 3; Slip op. pg. 3, fn. 3). The decision, made after a careful and thorough investigation of the charges by the NLRB, found that "the evidence does not show that the Carpenters District Council of Will County and Vicinity failed and refused to bargain in good faith with . . . (Petitioner MARBA or that the union) engag(ed) in take it or leave it bargaining." (APP. 35-37). A MARBA appeal of these findings was denied. (APP. 38).

with the 'rights' of the Trade Associations to engage in collective bargaining.

"Defendants Edison and Newberg moved to dismiss the complaint, and the district court granted this motion on February 11, 1981. The district court found that the only direct restraint alleged in the complaint was a restraint in the market for human labor. Such a restraint, the district court found, is exempt from antitrust scrutiny under the 'labor exemption' created by sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. The district court ruled, therefore, that the complaint failed to state a claim upon which relief could be granted." (footnote omitted). (APP. 2-4; Slip op. pgs. 2-4). The plaintiffs appealed this ruling.

After considering the briefs and hearing oral argument, the Seventh Circuit, on April 13, 1982, affirmed the judgment of the district court. The Court of Appeals, first reviewing the standards for the dismissal of a complaint,[4] found that "(a)n examination of the plaintiffs' complaint

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4. *E.g.*, "'The well-pleaded factual allegations of the complaint are taken as true' (citations omitted). A dismissal will be upheld only 'if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.' (citation omitted). The court, however, 'is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts.' (citation omitted). Furthermore, 'conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss.' (citations omitted) ('In testing the legal sufficiency of the complaint . . . conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted.')" (APP. 4-5; Slip op. pgs. 4-5).

in light of these standards demonstrates that the district court properly dismissed the complaint." (APP. 5; Slip op. pg. 5).[5] More specifically the court found, *inter alia*, that (w)hile the complaint uses the word 'conspiracy' repeatedly, it cannot be read . . . ." " . . . to properly plead such a conspiracy . . . ." so as to make the claim actionable (APP. 10; Slip op. pg. 10). The Court also held that "(b)oth the statutory and nonstatutory labor exemptions (to the federal antitrust statutes) served to immunize the defendants' activities from antitrust liability." (APP. 26; Slip. op. pgs. 24-25). On July 12, 1982, Plaintiffs filed their petition for a writ of certiorari to which this brief is in opposition.

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5. The Court of Appeals "recognized that (the Supreme Court) in *Poller* v. *Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962), cautioned against summary dismissal of antitrust claims, but (the Seventh Circuit reasoned that) we do not read *Poller* to require that we ignore Rule 12 (b)(6) of the Federal Rules of Civil Procedure in the context of antitrust claims. '(I)f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility.'" (citations omitted) (APP. 5, fn. 5; Slip op. pg. 5, fn. 5).

## SUMMARY OF ARGUMENT

Plaintiffs' petition presents no basis for the granting of certiorari. The Seventh Circuit's decision, affirming the District Court's granting of the Rule 12(b)(6) motion, is in harmony with the Clayton Act (15 U.S.C. § 17 and 29 U.S.C. § 52), the Norris-LaGuardia Act (29 U.S.C. §§ 104, 105 and 113) and with other related statutes and the decisions of this Court. The instant case neither presents a question which has been resolved in conflict with a decision by another Court of Appeals nor does it include a novel legal question. Accepting as true the facts alleged in their complaint, Plaintiffs do not state a cause of action under the antitrust laws. All that is involved in this case is a wage dispute following the expiration of collective bargaining agreements. The Union, as well as the Plaintiffs, met with a customer in an effort to influence it and its contractor. Such activity does not violate the antitrust laws, but rather reflects the economic pressure available as part and parcel of the collective bargaining process.

## ARGUMENT

**Taking the facts pleaded in their complaint as true, Plaintiffs do not state a cause of action under the antitrust laws where the factual allegation is that a union has a wage dispute both with an association of contractors and with non-affiliated, independent contractors and strikes and lockouts occur at the expiration of their collective bargaining agreements and where a struck customer of one non-affiliated, independent contractor directs its contractor to settle with the union on the customer's projects so that the work for the customer can be resumed. No antitrust law was violated here.**

This Court has insulated unions from antitrust liability so long as they acted in their own "self-interest."[6] Recognizing the import of the Norris-LaGuardia Act, it has noted that the Sherman Act was aimed only at commercial market restrictions or competition and not at labor activities designed to eliminate competition based on wages. Labor unions inevitably restrain competition among employees over the price of their services, such actions are not the kind of market restraint prohibited by the antitrust laws.[7] And, when a labor organization is not acting alone in some activity within its statutory status as the collective bargaining representative, it is still exempt from the Sherman Act if the disputed activity (e.g., wage settlement) involved only the labor market (*i.e.*, not the product market) and where the disputed activity (*e.g.*, wage settlement) was not imposed upon others, *i.e.*, there was no intentional, predatory, anticompetitive conspiracy.[8] Both the District Court and the Court of Appeals followed and applied the foregoing dictates in holding that — as a matter of law — Plaintiffs' complaint did not allege a violation of antitrust laws.[9]

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6. *United States* v. *Hutcheson*, 312 U.S. 219, 232 (1941).

7. *Apex Hosiery* v. *Leader*, 310 U.S. 469, 501, 503-504 (1940).

8. *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) and *Amalgamated Meatcutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

9. As the District Court held "the safe harbor provisions of the Clayton and Norris-LaGuardia Acts prohibit pleading a cause of action that is premised on an anticompetitive conspiracy involving unions when the restraint allegedly imposed by that conspiracy is not a direct restraint on the business market." (APP. 32; Slip op. pg. 5).

Plaintiffs' complaint and petition for certiorari is a spurious one.[10] For many years, the Plaintiff Associations have been the pace setter in the labor market for carpentry work in Will County, Illinois and Vicinity. Now, Plaintiffs have lost, or partially lost some of, their unchallenged predominance within certain employer circles. Newberg, and its customer Edison, have dared through the escrow agreement to act prior and not subsequent to the Plaintiff Associations. The Will County Carpenters employed their legitimate power of jawboning carpentry customers and contractors and, engaging in a selective strike in an attempt to force a settlement on terms most favorable to it. Similarly, the Plaintiff Associations jawboned the International Carpenters, other carpentry customers (including Edison) and contractors and, engaged in a retaliatory, total lockout of all carpenters in an attempt to force a settlement most favorable to them.[11] There was no more interference

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10. As was pointed out in our Answer and Counterclaim (dismissed on other grounds), Plaintiffs only brought this action in an attempt to blackmail the union into accepting a grievance arbitration provision in their collective bargaining agreement. The Will County Carpenters refused to be blackmailed and this suit resulted.

11. This Court has always recognized that "(t)he use of economic pressure by the parties to a labor dispute . . . is part and parcel of collective bargaining." *NLRB* v. *Insurance Agents International Union*, 361 U.S. 477, 495 (1960). And as it stated in *Local 76, International Association of Machinists & Aerospace Workers, AFL-CIO* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 147 (1976), "'(R)esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee, *American Ship Building Co.* v. *NLRB*, 380 U.S. (300), at 317." Indeed here, Plaintiffs recognized these rights and used them, albeit unsuccessfully, themselves.

with these collective bargaining negotiations than in any other negotiations. There was no intent or attempt by the Will County Carpenters or by Edison or Newberg to monopolize the product market or to impose a set wage increase throughout Will County, and the complaint makes no such allegations.[12] Each side wanted merely the best deal possible and both Newberg and Edison were valuable pawns directly interested in the dispute. One can, as Petitioners do, argue "subsidies" and an "utter stranger to the union-employer relationship" as invectives meant to "charge up" this case for the reviewer. The simple legal point, however, is that the escrow agreement,[13] terminating the strike against Newberg's Edison projects — thus permitting Newberg to resume work for Edison — evolved from the Union's lawful pressure on Newberg and Edison. Any effects of such an agreement could not serve as the basis for a Sherman Act cause of action.[14]

Petitioners argue that Edison is a stranger to the collective bargaining relationship between Newberg and the Union. This despite the fact that Edison as the customer having a facility built for it is perhaps the most affected by delays in construction. But even apart from that, Norris-LaGuardia dictates that the parties need not stand in the

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12. In the one forum where one of the Trade Associations did contend that the union tried to impose the wage proposal without bargaining, *i.e.*, engaging in take it or leave it bargaining, the NLRB, after a thorough investigation, dismissed the charge and affirmed the dismissal on appeal (APP. 35-38).

13. See APP. 34.

14. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 625 (1975).

proximate relationship of employer and employee. Norris-LaGuardia cannot be ignored.[15] *Bodine Produce Co., Inc.* v. *United Farm Workers,* 494 F. 2d 541 (C.A. 9, 1974) and *United Steelworkers of America* v. *Bishop,* 598 F. 2d 408 (C.A. 5, 1979). An agreement for the wages of a Will County carpenter is quite different than a union's agreement with contractors and manufacturers to permit on the job only electrical equipment manufactured in New York [*Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1945)] or where a union signed an agreement with a general contractor to whom it had absolutely no collective bargaining relationship, to subcontract its work to union contractors,

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15. As the Court of Appeals, quoting this Court, stated in the decision below, "(t)he Norris-LaGuardia Act further expands the intended scope of the labor exemption. The Act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy. [The Act defines a labor dispute as "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee (29 U.S.C. § 113(c)]. The right to bargain collectively is specifically protected (29 U.S.C. § 102). Although the Act does not by its terms provide a labor exemption from antitrust laws, 'it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes.' *H. A. Artists & Associates* v. *Actors' Equity Association,* 451 U.S. 704, 714 (1981). See L. SULLIVAN HANDBOOK OF THE LAW OF ANTITRUST 723 (1977)." (APP. 7-8, fn. 9; Slip op. pgs. 7-8, fn. 9). And as this Court held in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 622 (1975), conduct protected from injunction pursuant to the Norris-LaGuardia Act is also exempt "from the operation of the anti-trust laws."

only [*Connell Construction Co.* v. *Plumbers and Steamfitters Local 100,* 421 U.S. 616 (1975)]. Likewise, Petitioners' reliance on *Woelke & Romero Framing* v. *NLRB* (also identified by Petitioners as *Pacific Northwest Chapter of the Associated General Contractors, Inc.* v. *NLRB,* —— U.S. ——, 110 LRRM 2377 (1982), is inapposite. These cases deal with hot cargo agreements and not antitrust law.

In the final analysis, all that occurred here occurred within the context of a collective bargaining relationship and labor dispute. As a customer of Newberg, Edison was directly affected, *i.e.,* involved in the labor dispute. The union did not and could not threaten to strike Edison (a violation of the secondary boycott provisions of the National Labor Relations Act) but it could talk to Edison and pressure (*i.e.,* strike) its contractors. The union struck Newberg for a wage settlement and this vitally affected Newberg's customer. Edison wanted its projects completed without interference by a strike and had always paid and would always pay the bill. Newberg, alone or at the insistence of Edison, could have negotiated a final contract with the union. However, as the facts reflect, no final agreement was reached, nor was a minimum or maximum wage increase set. The parties established an escrow account with $2.25 for each hour worked by each carpenter being deposited in the account. Nothing was imposed upon MARBA. Instead, the parties deferred to the union Trade Association's wage settlement which was then being negotiated. If the MARBA settlement turned out to be less than the $2.25, the excess payment by Newberg would have been returned to Newberg. If the MARBA settlement was more, Newberg would have had to pay the additional amounts. There was no conspiracy or illegal act here. All customers, including Edison, have a vital interest in what happens to them. Here, Edison participated in those matters affecting

its interests. This is all that happened here. Within the framework of the existing facts, Defendants did not manifest an intent to suppress competition or to act in a fashion outside the statutory and case law antitrust exemptions.[16]

## CONCLUSION

No basis for granting certiorari exists. The petition should be denied.

Respectfully submitted,

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16. Dealing in labels only, Petitioners rely upon *Snyder Company* v. *Associated General Contractors of America, Detroit Chapter, Inc.*, 677 F. 2d 1111 (C.A. 6, 1982) to say that the statutory exemption is available only to unions and not to non-union groups. *Snyder* is talking specifically about restraint of trade [*Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945)] and not about a direct restraint on the labor market which is the fact herein. Moreover, *Snyder* also recognized the import of the Norris-LaGuardia Act, an Act which Petitioners herein religiously avoid.